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In the Supreme Court of the United States

OCTOBER TERM, 1990

FRANCIS J. BRADAC AND ELIZABETH M. BRADAC,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the position of the United States in a condemnation action was "substantially justified" under the Equal Access to Justice Act, 28 U.S.C. 2412 (d)(1)(A), when the United States used an experienced, qualified appraiser who used comparable properties as the basis for his appraisal, the United States reasonably relied on that appraisal, and there was no evidence of bad faith by the United States.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Knollman v. *United States*, 214 F.2d 106 (6th Cir. 1954)	8
Pierce v. *Underwood*, 487 U.S. 552 (1988)	3
Rogers v. *Lodge*, 458 U.S. 613 (1982)	9
United States v. *124.84 Acres of Land*, 387 F.2d 912 (7th Cir. 1968)	8
United States v. *312.50 Acres of Land*, 851 F.2d 117 (4th Cir. 1988)	7
United States v. *1,378.65 Acres of Land*, 794 F.2d 1313 (8th Cir. 1986)	4, 7, 9
United States v. *640.00 Acres of Land*, 756 F.2d 842 (11th Cir. 1985)	10
United States v. *American Pumice Co.*, 404 F.2d 336 (9th Cir. 1968)	8
United States v. *Charles Gyurman Land & Cattle Co.*, 836 F.2d 480 (10th Cir. 1987)	9

Statute:

Equal Access to Justice Act, 28 U.S.C. 2412 (d) (1) (A)	2, 4, 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 910 F.2d 439. The opinion of the district court (Pet. App. 13-21) and the memorandum and order of the district court on petitioners' motion for reconsideration (Pet. App. 24-27) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12) was entered on August 15, 1990. A petition for rehearing was denied on October 4, 1990. The petition for a writ of certiorari was filed on January 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Equal Access to Justice Act (EAJA) requires, *inter alia*, that "fees" be awarded to a "prevailing party" in civil litigation brought by the United States, "unless the court finds that the position of the United States was substantially justified." 28 U.S.C. 2412(d)(1)(A). This case arises out of an EAJA attorneys' fees claim by petitioners. In 1977, the United States, on behalf of the National Park Service, sought to acquire petitioners' property in Polk County, Wisconsin, for inclusion in the St. Croix National Scenic Riverway. Following nearly a decade of offers and counter-offers between the Park Service and petitioners, the United States brought a condemnation proceeding. Trial was held on the issue of just compensation. The jury returned a verdict of $170,000. After the United States paid that amount, petitioners sought attorneys' fees under EAJA. The district court and court of appeals held that the position of the United States had been "substantially justified" and denied attorneys' fees. Pet. App. 2-4; see also *id.* at 14-16.

1. The district court recounted the lengthy dealings between the United States and petitioners. Petitioners' property consisted of approximately 139.5 wooded and waterfront acres, divided into two parcels. In 1977, the United States offered $38,000 for a fee interest in petitioners' first parcel and $24,000 for a scenic easement in the second. Petitioners rejected both. Nearly two years later, the United States offered $83,400 for a fee interest in the first parcel and $9,600 for a scenic easement in the second. Petitioners rejected that also. In May of 1986, the United States made another offer. It offered to pay $70,000 for a fee interest or $38,500 for a riverfront easement in the first parcel and $2,500 for a scenic

easement in the second. This too was rejected. Pet. App. 14-15.

The person employed by the United States to appraise the property prior to its May 1986 offer was Everett Strand. Pet. App. 15. Strand's appraisal was based on a study he had conducted two years earlier. *Ibid.* That study used a "market" ("comparable") approach to valuation, which "compares similar property to determine the condemned parcel's value." *Id.* at 3. The appraisal did not specifically include comparable sales, if any, along the St. Croix River. *Id.* at 15.

Throughout the nine years when the United States was making those offers, petitioners never "allowed an appraiser retained by the government to visit the premises for an on-site inspection." Pet. App. 4 n.3, 15. In October 1986, Strand was finally allowed access to petitioners' property. *Id.* at 20. After inspecting it, again employing the "market" approach, Strand gave it a value of $126,000 before taking and $107,000 after taking ($19,000 appraised value). *Id.* at 15, 18. Strand attributed the lower value of this latest appraisal to the depressed economy in Polk County. *Ibid.* Although he did not use comparables along the St. Croix River (*ibid.*), he did base his appraisal on "wooded areas and waterfront property" comparable to petitioners' property. *Id.* at 20.

Petitioners employed Peter Patchin to appraise their property. Patchin estimated a before-taking value of approximately $307,000 and an after taking value of $152,000 ($155,000 appraised value). Pet. App. 15. He used the "development" method of appraisal, which involves speculation as to "the value of the land * * * if it were eventually developed." *Id.* at 3. Petitioners, however, did not advise the

United States of Patchin's appraisal "until shortly before trial." *Id.* at 16, 20.

Prior to trial, the district court ruled that the taking by the United States was "justified." Pet. App. 16. The jury heard testimony on "damages" from the United States and from the landowner, petitioner Francis Bradac. Mr. Bradac testified that damages were at least $280,000. *Ibid.* The jury returned a just compensation verdict of $170,000, based on a before taking value of $307,000 and an after taking value of $137,000. *Ibid.*

2. Following the trial and payment of the $170,000 judgment by the United States, petitioners sought attorneys' fees from the United States under EAJA Section 2412(d)(1)(A), 28 U.S.C. 2412(d)(1)(A). Pet. App. 16. The district court found that petitioners were the "prevailing" parties under EAJA (Pet. App. 18), and proceeded to examine whether the position of the United States had been "substantially justified." The court employed the Eighth Circuit standard as articulated in *United States* v. *1,378.65 Acres of Land (Vernon County)*, 794 F.2d 1313 (1986). There the Eighth Circuit stated:

> [w]hen in a condemnation action, the Government selects experienced, qualified, competent appraisers, and consistently relies on their valuations in its offers of just compensation, without any evidence of bad faith on its part, its course of conduct is solid, well founded, and clearly reasonable. Its position, therefore, is substantially justified.

Id. at 1319.

Under the *Vernon County* standard, the district court first found Strand to be an "experienced, quali-

fied and competent appraiser." Pet. App. 19. Second, the court found that the United States, in its pretrial negotiations and at trial, relied on Strand's appraisals. *Ibid.* Strand's October 1986 appraisal was lower than his May 1986 appraisal because, by October, market conditions in the area had become depressed. *Ibid.* Moreover, only in October 1986 was he "finally" allowed to visit petitioners' land. *Id.* at 20. The court noted that in his appraisal Strand had used "wooded areas and waterfront property" that were comparable to petitioners' own acreage, although Strand's comparables were not along the St. Croix River. *Id.* at 15.

Third, there was no evidence of bad faith by the United States. Indeed, "until shortly before trial," the United States had no reason to think that it might not be substantially justified in relying on Strand's appraisal, for not until that late date did petitioners even inform the United States of Patchin's valuation. Pet. App. 20. The United States also "reasonably rejected" Patchin's "development" appraisal since Strand believed that the market could not support the development proposed by petitioners. *Ibid.* Therefore, with *Vernon County* satisfied in all three respects, the district court ruled that the position of the United States was "substantially justified" and that petitioners were not entitled to recover attorneys' fees under EAJA.

3. The district court ruling was affirmed by a divided panel of the Seventh Circuit. The majority followed *Vernon County*. Pet. App. 8. The Court held that Strand was "experienced, qualified and competent." *Id.* at 7. The United States relied on his appraisals to formulate its offers. *Id.* at 7-8. And there was "no showing of bad faith" by the United

States. *Id.* at 8. Rather, the court found that its "review of the record * * * shows a history of good faith settlement offers by the United States." *Ibid.*

The court found that Strand's use of comparable wooded and waterfront property not actually in the St. Croix River area was "puzzl[ing]" (Pet. App. 8), but of no legal significance. The court ventured that obtaining comparables in that area was "perhaps" due to the fact that "no privately sold riverfront property existed locally, as it had been or was in the process of being acquired by the government for the National Park." *Id.* at 3. Nor did any "legal authority" require that Strand employ the "development" appraisal method over the "market" approach. *Id.* at 8. In conclusion, the court held that the district court did not abuse its discretion when it found that "the Government selected an experienced, qualified appraiser in Mr. Strand, and that it consistently relied on Strand's appraisals of the [petitioners'] property in its offers of just compensation." *Id.* at 9.

Judge Pell, in dissent, agreed that *Vernon County* was the "guiding star" here. Pet. App. 10. Nor did he take issue with the findings of the district court as to Strand's experience and qualifications, the method of valuation he employed, or the extent to which his appraisal used genuinely comparable properties. Rather, he believed that the district court had denied petitioners sufficient opportunity to prove their claims of government bad faith. *Ibid.* Judge Pell therefore would have vacated the district court ruling and remanded for an evidentiary hearing on the issue of bad faith. *Id.* at 11.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Nor does the question presented by this case—whether the actions taken by the United States in acquiring petitioners' land were "substantially justified" under EAJA—raise any issue of national importance. Accordingly, further review is not warranted.

1. According to petitioners, the court of appeals ruled that the United States need "only" show that its offer was based on the appraisal of an experienced, qualified appraiser—and the appraisal need not have even been "done in the proper manner"—in order to demonstrate that its position in a condemnation case is "substantially justified." Pet. 7. Petitioner's interpretation of the court of appeals' decision is mistaken.

a. First, *Vernon County* established a three-part test for determining whether the conduct of the United States in a condemnation case is "substantially justified" under EAJA. 28 U.S.C. 2412 (d)(1)(A). The United States must: (1) select "experienced, qualified, competent appraisers"; (2) "consistently rel[y]" on their evaluations; and (3) there must be no evidence of "bad faith" by the United States. *Vernon County*, 794 F.2d at 1319; Pet. App. 7. *Vernon County*—as decided by the Eighth Circuit and as applied by the Seventh Circuit in this case [1]—plainly requires more for a "substantially justified" government position than "only" reliance on "experienced, qualified, competent apprais-

[1] *Vernon County* has also been adopted by the Fourth Circuit in *United States* v. *312.50 Acres of Land*, 851 F.2d 117, 119 (1988).

ers." Lack of government bad faith is also an indispensable element.[2]

b. Second, petitioners' argument (Pet. 12-13) that the government's position was not substantially justified because the appraisals in this case improperly compared the condemned property with properties not located in the St. Croix River Valley is also mistaken. Traditional tests of comparability do not turn on physical closeness of the comparable property to the subject property. "Similarity of character and locality depends not upon mere propinquity." *United States* v. *124.84 Acres of Land, Warrick County, Indiana*, 387 F.2d 912, 915 (7th Cir. 1968), citing *Knollman* v. *United States*, 214 F.2d 106, 109 (6th Cir. 1954); *United States* v. *American Pumice Co.*, 404 F.2d 336, 336-337 (9th Cir. 1968) ("There may be cases where quite distant properties can be shown to be comparable in an economic or market sense.").

In light of the principle that comparable properties need not be in close physical proximity to the condemned property, the district court found that Strand "used comparables containing both wooded areas and waterfront property" (Pet. App. 20), and

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[2] Similarly, petitioners err in asserting that the court of appeals "deviated" (Pet. 9) from this Court's holding in *Pierce* v. *Underwood*, 487 U.S. 552, 566 (1988), that to be "substantially justified" means more than to be simply "undeserving of sanctions for frivolousness." Petitioners argue that the court of appeals required that the government "merely * * * assert[]" lack of bad faith—a standard that petitioners believe to be tantamount to "frivolousness"—in order to show substantial justification. Pet. 11. Yet the court of appeals quite plainly analyzed the case in terms of all three *Vernon County* factors, not merely lack of bad faith.

the Seventh Circuit noted that both of Strand's appraisals "utilized comparable parcels in his analysis." [3] *Id.* at 8. The factual finding of both courts below that comparable properties were used in the appraisals is entitled to great weight in this Court.[4] See *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982) (citing cases). In any event, such a finding would not warrant further review.

2. Petitioners also contend that the court of appeals has broken with the "substantial justification" standards in "at least" two other circuits. Pet. 14. Petitioners concede, however, that the "substantial justification" standards in the two circuits they identify simply require broad "totality of the circumstances" inquiries. Pet. 15 n.18.[5] Petitioners do not

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[3] As the quotation in text demonstrates, petitioners misstate the court of appeals' opinion when they assert that "[t]he Seventh Circuit openly admitted that 'comparable parcels' were not used by the U.S. Government." Pet. 15.

[4] Petitioners assert (Pet. 12) that the court of appeals' decision actually conflicts with the Eighth Circuit's decision in *Vernon County* because the Seventh Circuit allegedly "abandoned" *Vernon County*'s "factual predicate" that "similar plots of land" must be compared in making an appraisal. That assertion is mistaken. First, the court of appeals in this case found that Strand's appraisal did compare similar plots of land. Second, the phrase "similar plots of land" in *Vernon County* appears in the Eighth Circuit's recitation of the facts of that case and cannot be read to incorporate petitioners' suggested rule requiring close geographic proximity of comparable properties. See *Vernon County*, 794 F.2d at 1315. As did the Seventh Circuit here, the Eighth Circuit in *Vernon County* eschewed any rigid rule for determining when two properties are comparable, noting that an appraisal is a "peculiarly technical factual determination" and "more an art than a science." *Id.* at 1318.

[5] See *United States* v. *Charles Gyurman Land & Cattle Co.*, 836 F.2d 480, 485 (10th Cir. 1987) ("totality of the circum-

explain how standards of such breadth are undermined by the court of appeals' decision here.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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stances" determines whether position of United States substantially justified); *United States* v. *640.00 Acres of Land*, 756 F.2d 842, 849 (11th Cir. 1985) ("substantially justified" standard "essentially one of reasonableness").

[6] Petitioners appear to introduce yet another obligation incumbent on the United States by charging that the court of appeals did not make a separate finding that Mr. Strand was "neutral and impartial." Pet. 15. *Vernon County* does not require this separate inquiry, and the findings of both courts below that Strand was "qualified and competent" (Pet. App. 7, 9, 19) put to rest any suggestion that his objectivity was in doubt.

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